

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

LEO GARCIA,  
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DOCKET NUMBER  
DA07528710128

DATE: AUG 25 1987

Albert A. Kia, American Federation of Government  
Employees, San Antonio, Texas, for the appellant.

Captain Robert L. Woods, Esquire, San Antonio, Texas,  
for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Dennis M. Devaney, Member

Member Devaney dissents without opinion.

OPINION AND ORDER

The agency petitions for review of an initial decision, issued March 27, 1987, that sustained the charges against the appellant but mitigated the penalty from removal to a ninety-day suspension. For the reasons below, we GRANT the petition for review under 5 U.S.C. § 7701(e), AFFIRM the initial decision as MODIFIED, and SUSTAIN the appellant's removal.

BACKGROUND

The agency removed the appellant, an Air Conditioning Equipment Mechanic, WG-10, on November 14, 1986. The action was based on two charges of "willful intent in the unauthorized use of a government vehicle." The charges stemmed from the appellant's use of a government-owned vehicle on August 20 and September 18, 1986, to take his work breaks.<sup>1</sup>

On appeal to the Board's Dallas Regional Office, the administrative judge sustained the charges but mitigated the penalty. She found that the agency proved by a preponderance of the evidence that the appellant willfully misused a government-owned vehicle by using it solely to take breaks in violation of agency policy. She further found that disciplinary action against the appellant promoted the efficiency of the service. She concluded, however, that the maximum reasonable penalty was a ninety-day suspension. The administrative judge rejected the appellant's affirmative defenses of reprisal, harmful procedural error, and national origin discrimination.

In its petition for review, the agency asserts that the administrative judge erred in mitigating the penalty.<sup>2</sup>

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<sup>1</sup> The agency originally proposed a thirty-day suspension for the first incident. It rescinded this proposal and proposed the appellant's removal after the second incident.

<sup>2</sup> The appellant did not submit a cross-petition for review or respond to the agency's petition for review.

ANALYSIS

The Board will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will assure only that managerial judgment has been properly exercised within tolerable limits of reasonableness. *Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320 (1981). We find that the administrative judge improperly substituted her judgment for the agency's in this case.

To support her decision to mitigate the penalty, the administrative judge cited the appellant's three years of service, fully satisfactory performance rating, lack of a prior disciplinary record, and potential for rehabilitation. We do not agree that these factors warrant mitigating the appellant's removal. The appellant's period of service with the agency--three years and nine months--was relatively short. Further, although his performance ratings were satisfactory and he had no prior disciplinary record, his supervisor, Gregory Lopezieo, stated that he had been counselled for not being productive and that his attitude towards his job is poor. Agency File, Tab 13. Moreover, we agree with the agency that the appellant, who committed a second offense of misuse of a government-owned vehicle six days after receiving notice of his proposed thirty-day suspension for a first offense and who, according to the administrative judge herself, expressed no remorse for his actions, has not exhibited a potential for rehabilitation.

Furthermore, both Mr. Lopezio and the deciding official, Dana Ulanoff, clearly set forth additional legitimate reasons that support the appellant's removal. Mr. Lopezio noted that the offenses were serious, the appellant was a journeyman mechanic who worked independently and therefore his position exacted the agency's trust, and the appellant set a bad example for his lower-graded helper. Agency File, Tabs 5 and 13. In his testimony, Mr. Ulanoff echoed these concerns and added that the appellant had lied when questioned about the misuse, the removal was consistent with the agency table of penalties, and the appellant clearly had been placed on notice that this type of use of the vehicle was improper. See Transcript at 78-86.

Therefore, we conclude that the agency-imposed penalty of removal in this case does not exceed the bounds of reasonableness. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

### Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national


origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board